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In the Supreme Court of the United States

October Term, 1940

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BRIGHAM YOUNG UNIVERSITY,
Petitioner and Appellant,

vs.

EDITH CANNON LILLYWHITE,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TOPICAL INDEX

	Page
Petition for Writ of Certiorari	1
I. Summary of Statement of Matter Involved	1
II. Basis of Court's Jurisdiction	8
III. Questions Presented	9
IV. Reasons Relied Upon for Allowance of Writ	10
Brief in Support of Petition	12
I. Opinions of Court Below	12
II. Statement of Case	12
III. Argument	12
1. Admission of testimony of Instructor Harvey Howell and Dr. Elton Quinn	12
2. Instruction of the Court	15
3. Denial of Petitioner's Motion for Directed Verdict	17
4. University an Eleemosynary Non Profit Institution entitled to exemption from liability	27
IV. Conclusion	30

32527

AUTHORITIES CITED

Page

Bates v. San Pedro L. A. S. L. R. Co., 38 Utah, 568; 114 P. 527 26

Benjamin v. Nernberg, (Pa. 1931), 157 Atl. 10 26

Branchi v. South Park Presbyterian Church, et al, (N. J. 1939), 8 A. (2d) 567-571 26

Bullock v. Luke, 98 Utah 501; 98 P. (2d) 350 24-26

Busse v. Murray Meat & Livestock Co., (1915) 45 Utah 596, 147 P. 626 24

Capps v. Carpenter (Kan.) 283 P. 655 20

Carroll v. Central Counties Gas Co., 273 P. 875 15

Dingman v. Mattock Co., (Cal. 1939), 96 P. (2d) 821 26

Dolley v. Mid-Western Dairy Products Co., 80 Utah 331, 15 P. (2d) 309 26

Ettlinger v. Trustees of Randolph Macon College (C. C. A. 4th 1929) 31 F. (2d) 869 ..... 9, 30

Fee's Admrx. v. Mahan-Ellison Coal Corp. (Ky. 1931), 43 S. W. (2d) 681 24

Ford v. Coml. Motor Freight (Ohio) 14 N. E. (2d) 354-357 21

Gallenkamp v. Garvin Mach. Co. (N. Y.) 99 N. E. 718 20

Garthe v. Ruppert (N. Y.) 190 N. E. 643 14

Gulland v. Northern C. & D. C. (Wis.) 132 N. W. 755-56 21

Hamburger v. Cornell University (N. Y.) 148 N. E. 539, 42 A. L. R. 955-963 ..... 9, 23, 30

Henderson v. Twin Falls County, 56 Idaho 124, 50 P. (2d) 597; 101 A. L. R. 1151 29

Higgins v. Pratt Institute (C. C. A. 2d. 1930) 45 F. (2d) 698 ..... 9, 30

Hough v. Stone (Ohio 1925) 153 N. E. 313 15

Page

Knight v. Southern Pacific Co., 52 Utah 42, 172 P. 689..... 26

Lowe v. Lehman, 15 Ohio St. 179 16

McClellan v. Pa. R. Co. (2d C. C. A.) 62 F. (2d) 61..... 15

Moose v. Galigher Mach. Co., 51 Utah 504, 171 P. 153..... 26

National Pressure Cooker Co. v. Stroeter (7th C. C. A.) 50 F. (2d) 642, Certiorari denied 284 U. S. 674, 76 L. Ed. 570 15

O'Brien v. Alston, 61 Utah 368, 213 P. 791 26

Parks v. Northwestern University (Ill.) 75 N. E. 991.....9, 30

Philadelphia & R. Ry. Co. v. Thirouin (C. C. A. 3rd) 9 F. (2d) 856 19

Quinn v. Utah Gas & Coke Co. (1912) 42 Utah 113, 129 P. 362 24

Ruhlin, et al. v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 8

Sessions v. Thomas Dee Memorial Hospital Ass'n., 89 Utah 222, 51 P. (2d) 229 8

Sessions v. Thomas Dee Memorial Hospital Ass'n., 94 Utah 460, 78 P. (2d) 645 8

Skelly Oil Co. v. Chambers (C. C. A. 10th) 87 F. (2d) 853.. 24

Steggell v. Salt Lake & U. R. Co., 50 Utah 139, 167 P. 237.... 24

Stocker v. Boston & M. R. R. (N. H.) 143 Atl. 68 15

Tremelling v. Southern Pac. (1917) 51 Utah 189, 170 P. 80 24

Watkins v. Piggly Wiggly Bird Co., (C. C. A. 8th) 31 F. (2d) 889 24

Wilcox v. Idaho Falls Hospital, 82 P. (2d) 849 29

F. W. Woolworth v. Davis (C. C. A. 10th), 41 F. (2d) 342.... 24

Statute:

Judicial Code, Sec. 240, Amended 28 U. S. C. A. Sec. 347 8

In the Supreme Court of the United States
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BRIGHAM YOUNG UNIVERSITY,
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vs.
EDITH CANNON LILLYWHITE,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Charles Evans Hughes, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows to this court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner BRIGHAM YOUNG UNIVERSITY is a non-profit corporation without capital stock, chartered to do business under and by virtue of the laws of the State of Utah with its principal place of business at Provo, Utah, where it conducts an educational institution of higher learning for the benefit of the members of the Church of Jesus Christ of Latter-day Saints in particular and for the public at large. Petitioner first began as an unincorporated college founded by President Brigham Young on or about the 16th day of October, 1875. He, at that time,

made a grant by deed of trust of property to petitioner's predecessor for its maintenance and operation. After his death and on or about the 18th day of July, 1896, the University was incorporated and the maintenance and operation thereof taken over by the Church of Jesus Christ of Latter-day Saints through said Corporation. The petitioner has been ever since said last named date maintained and operated by said Church, except that petitioner has received some donations and gifts from individuals and has charged matriculating students a tuition of $75.00 per year when the average operating cost per capita per year per student is $175.00. Since its incorporation the University has provided part tuition for widows' daughters in the sum of $30,030.00, and further during its annual Leadership Week has furnished free instruction and facilities to large numbers of Church members and the public not regularly matriculated at said University; the petitioner is on the approved list of the Association of American Universities and has had an average annual attendance for the period from 1929 to 1939 of 2300 students per year; the Church has over a period from July of 1896 to June of 1939, appropriated for the use and benefit of said institution the sum of $5,844,272.44 (R. 100-101).

Among the subjects taught by petitioner is the subject of chemistry, including both classroom and laboratory instruction (R. 90-91).

The respondent, Edith Cannon, at the age of 18 years, first registered for work at the University as a freshman in the fall of 1932. She had that spring graduated from the Davis County High School and at the time was living at Bountiful, Utah. She continued at the University except for time out because of the accident suffered by her in her chemistry laboratory work until the end of the school year of 1934. In August of that year she married Mr. Lillywhite, also a student at the University, and in the fall of the same year moved with him to Arizona where she has since resided (R. 41).

At the beginning of the Fall Quarter of 1932 she registered for and took Chemistry I, a lecture course conducted by Dr. Hugh W. Peterson, which was a course where the instructor taught the principles of chemistry and conducted experiments for the class to demonstrate the work, including the generating of and testing for oxygen, which experiment appellee in the spring quarter was engaged in performing at the time of the accident complained of in this case (R. 64-5).

In the Spring Quarter of 1933 she registered for Chemistry II, which was the laboratory course in question here. She began the course on March 20, 1933, under the direction of Instructor Alva J. Johansen, who had graduated from the University the year previous with a major in chemistry. There were thirteen in the class and the laboratory sessions were from 3:30 to 5:30 on Mondays, Wednesdays and Fridays (R. 72).

In beginning the course the students were assigned to what was known as the West Laboratory where they were met by Dr. Johansen (he having taken his doctor's degree in chemistry in the interim between the accident and the trial), who took up with them the Chemistry Manual they were to study and instructed them in the general technique of the work to be done in the course, the equipment to be used, the nature of the chemicals and compounds they were to use and the care required in proceeding with the work. They were told what chemicals and other substances were available to them in labeled bottles or containers on their desks, or arranged on shelves around the walls of the laboratory. Following the instructions given, the respondent with Miss Kay and Miss Rice, girls of about the same age and training, were assigned to desks adjoining each other and allowed to work out the exercises together. From the beginning of the course up to the 5th day of April, 1933—the day the accident occurred—the class and respondent had attended five laboratory periods and had come to Exercises 10 and 11 in the Manual, which had been previously assigned for work on that day (R. 72-4). Miss Cannon didn't remember going into the laboratory earlier than

the regular time on that day although Miss Kay and Dr. Johansen testified that they had commenced their work ahead of time to enable them to get through with their work sooner than usual.

The first experiment for that day was Exercise No. 10 (page 12 Chemistry Manual) (R. 121) providing for the preparation of oxygen by a variety of methods, mostly what is called test tube chemistry. Several metallic oxides, including manganese dioxide and lead peroxide and *potassium chlorate*, were used (R. 76-77). The text presenting this exercise contained a particular "caution" (R. 122) as to the use of potassium chlorate.

The oxygen was tested for in each experiment by inserting a glowing splint into the test tube after the contents thereof had been heated over a Bunsen gas burner, the use of which had been covered by Exercise No. 2 from the Manual (Exh. No. 2). Dr. Johansen had assisted the girls in the performance of this experiment No. 10 but, having an appointment, left the room with the instruction, he says, for the girls to get the equipment set up for Exercise No. 11 and await his return, but according to Miss Cannon to go right ahead with Exercise No. 11 (R. 15).

Regardless of what the instruction was the girls did go right ahead with Exercise No. 11 which is set out in the Manual. The objective of this experiment was "to learn several of the properties of oxygen." To accomplish this end it was necessary first to generate oxygen, catch it in bottles and then in the various ways prescribed in the lesson test for the oxygen (R. 15-16).

In preparing to perform the experiment a set of apparatus had to be set up (see drawing R. 16 post). After this had been done then two chemicals had to be mixed and placed in the test tube as appears in the drawing. The materials to be used according to the Manual were "manganese dioxide or ferric oxide, and potassium chlorate." To test for the oxygen the Manual provided that the student should secure "asbestos paper, combustion spoons, splints, sulfur, red phosphorus, iron picture wire, small candle."

Detailed directions as to each step to be taken by the student in doing the work were given as a part of the experiment (see Exercise R. 15).

The chemicals generally used to produce oxygen were manganese dioxide and potassium chlorate, or ferric oxide and potassium chlorate. In this laboratory manganese dioxide was the most commonly used, however, on this day the girls secured ferric oxide for use with the chlorate (R. 88-89).

In the regular class periods, and on this day, it was Dr. Johansen's procedure to help the students in his class and the three girls involved here, when and if they needed help, and after giving the help requested he would walk around through the laboratory helping other students or doing as he pleased. If one of the students or a group wanted him, he or they would call for Dr. Johansen to come and render the needed assistance (R. 37-48).

The girls here in going forward with Exercise No. 11 assembled the equipment and the various chemicals necessary for the experiment and set up the apparatus as pictured, mixed the supposed proper chemicals and proceeded with their attempt to generate oxygen by applying the Bunsen burner to the tube which contained the mixture—Dr. Johansen still being absent from the room. When the girls had supposedly made the mixture of potassium chlorate and ferric oxide and were about to apply the heat Miss Kay raised the question as to whether they should wait or go ahead (R. 39). She said:

> "One or both of the girls urged me to go ahead. I don't remember whether it was one or both. * * * They egged me on to do it and I did it and then there was the explosion."

The undisputed cause of the explosion was that the girls mixed the phosphorus, with which they were to test for the properties of oxygen, with the potassium chlorate and then applied

the gas burner. The mixture should have been the ferric oxide which they had secured from the stockroom and the potassium chlorate. Miss Cannon was working in a position between the other two girls. When the lighted burner was applied to the test tube containing the mixture the girls had compounded an explosion occurred which shattered the glass tube and other parts of the equipment, causing the injury to respondent complained of by her.

Respondent as a resident of the State of Arizona brought this case in the Federal District Court of Utah. In the trial of the case the attorney for respondent called as witnesses Instructor Harvey Howell, teacher of chemistry at the East Side High School of Salt Lake City, and Dr. Elton L. Quinn, instructor of chemistry at the University of Utah. The trial court, over the objection of petitioner, permitted these men to testify as to how each one of them conducted his department at his respective place of employment without regard to the fact that the conditions in neither institution compared in any way with that of petitioner (R. 51-52) (R. 59-62).

The court in submitting the case to the jury on this issue gave the following instruction:

> "THE COURT: I will reframe it, and say to the jury now, that the usual practice in other universities in respect to this or similar experiments in respect to supervision may be considered by you in determining whether or not Dr. Johansen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration (Tr. 414)." (R. 8, 112).

The truth is, there was no evidence of custom or the usual practice in other Universities.

When the respective parties to the case had rested the petitioner moved the court for a directed verdict on the grounds:

First: That the plaintiff has failed to prove by any evidence the allegations of negligence set out in her complaint.

Second: That the plaintiff has failed to prove any negligence on the part of the defendant that proximately caused the accident resulting in the injury complained of by the plaintiff.

Third: That the plaintiff has established by the evidence that she assumed the risk and known dangers of the course in which she was engaged at the time of the accident.

Fourth: That plaintiff has established by her evidence the proximate cause of the injury was the action of herself and/or her friends, and not the action of the defendant.

Fifth: That the plaintiff has established affirmatively that she, with her two companions, were each guilty of negligence, which negligence proximately contributed to the plaintiff's injury.

Sixth: That the undisputed evidence shows that the defendant is a charitable and eleemosynary institution, and not liable in this case to the plaintiff for any injury suffered by her as a result of the accident complained of in her complaint (R. 101-102).

The court overruled the motion and then, reserving as a question of law the issue as to whether or not petitioner was exempt from liability as an eleemosynary institution, submitted the case to the jury. The jury, based upon answers to nine special interrogatories (R. 22-23), returned a verdict for respondent in the sum of $3500.00. Petitioner then moved for judgment notwithstanding the verdict (R. 23). This motion was based upon the grounds:

1. As set out in the motion for directed verdict. (See above).

2. That the judgment was not supported by the answers given to the special interrogatories (R. 22-23), because there was a conflict in the answers. For example, question 7 and answer: "Did the plaintiff or either of the

girls in proceeding with the experiment *negligently* make the mistake of mixing the wrong chemicals and did such mistake proximately cause the explosion? Answer: Yes."

3. That petitioner was exempt from liability as a non profit institution, engaged in an activity of great benefit to the public.

The court denied the motion and entered judgment against petitioner in the sum of $3500.00. Petitioner next, within time, filed its motion for a new trial (R. 28) which was submitted to and overruled by the court. Petitioner then appealed to the Circuit Court of Appeals of Tenth Circuit. The court affirmed the trial court. Petitioner requested a rehearing. This was denied, but Presiding Judge Phillips filed a dissenting opinion. (R. 137).

This petition is for a review of the decision of said Circuit Court of Appeals.

II

BASIS OF COURT'S JURISDICTION

1. The date of the judgment to be reviewed was January 17, 1941 (R. 135). The date of the order overruling petition for a rehearing was April 14, 1941 (R. 145).

2. The Circuit Court of Appeals of the Tenth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

Judicial Code, Sec. 240, amended, 28 U. S. C. A. Sec. 347;
Ruhlin, et al, v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290;
Sessions v. Thomas Dee Memorial Hospital Assn., 89 Utah 222, 51 P. (2d) 229;
Sessions v. Thomas Dee Memorial Hospital Assn., 94 Utah 460, 78 P. (2d) 645;

3. That this case presents a most important public question

for determination by this court because it is the first case in either State or Federal Courts to hold an University supported by endowment, or like funds, liable for alleged negligence under facts such as those involved in the instant case. State and Federal cases in conflict are:

Hamberger v. Cornell University (N. Y.), 148 N. E. 539, 42 A. L. R. 955;
Parks v. Northwestern University (Ill.), 75 N. E. 991;
Ettlinger v. Trustees of Randolph Macon College (C. C. A. 4th 1929) 31 F. (2d) 869;
Higgins v. Pratt Institute (C. C. A. 2d 1930) 45 F. (2d) 698.

III

QUESTIONS PRESENTED

1. The Circuit Court of Appeals erred in sustaining the admission by the trial court of the testimony of Instructor Harvey Howell (R. 49) and Dr. Elton Quinn (R. 59) on behalf of respondent relative to the conduct of their respective chemical laboratories in other institutions of learning (R. 2 to 5).

2. The Circuit Court of Appeals erred in sustaining the trial court in instructing the jury under the state of the record that it could consider "the usual practices in other universities." (R. 8-112)

3. The Circuit Court of Appeals erred in sustaining the trial court in denying petitioner's motion for directed verdict because:

(a) Respondent failed to prove the allegation of negligence set out in her complaint.

(b) Respondent failed to prove any negligence on the part of petitioner that proximately caused the accident.

(c) There was affirmative proof by respondent that she was guilty of negligence proximately contributing to the accident.

(d) Respondent assumed the risk of the ordinary and obvious dangers incident to the laboratory work undertaken by her.

(e) The petitioner University is a non-profit eleemosynary institution exempt from liability for the negligent acts of its servants.

4. The Circuit Court of Appeals erred in sustaining the trial court in the denial of petitioner's motion for judgment notwithstanding the verdict. The motion was based particularly upon point "(e)" under point "3" next above set out since the court had reserved that point as one of law, also upon the ground that the answers to the special interrogatories (R. 26) did not support the verdict (R. 24). The other points made in support of motion for directed verdict were resubmitted and included in the ruling of the court.

5. The Circuit Court of Appeals erred in sustaining the trial court in the denial of petitioner's motion for a new trial, which motion was based upon the following grounds: (R. 28)

(a) Irregularity in the proceedings of the court and jury by which the defendant was prevented from having a fair trial.

(b) Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

(c) Errors in law occurring at the trial, and excepted to by the defendant.

IV

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. That the trial and appellate courts have each committed a grevious mistake to the injury of petitioner in permitting this case to be submitted to the jury on evidence such as that of Instructor Howell and Dr. Quinn as to how each conducted his laboratory, as did the trial court in instructing the jury that it

could consider such evidence as going to prove an "usual and customary practice."

2. That the question of whether this petitioner as an educational institution shall be held liable for negligence under all of evidence introduced in this case is of great public interest and concern and rightfully deserves determination by this court.

3. That the majority opinion has decided a most important question of local law in a way that brings the decision in conflict with applicable local decisions.

4. That this court should determine and say whether or not under the law of Utah and the other state and federal cases in conflict with the decision in this case, the majority decision should be allowed to stand and establish the law in this most important public field.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2167, BRIGHAM YOUNG UNIVERSITY, a corporation, Appellant, vs. EDITH CANNON LILLYWHITE, Appellee, and that the said judgment of the Circuit Court be reversed by this Honorable Court and remanded with directions that said case be by the trial court dismissed; and your petitioners will ever pray.

BRIGHAM YOUNG UNIVERSITY,

By ROBERT L. JUDD,
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Of Counsel.